

No. 15134

United States
Court of Appeals
for the Ninth Circuit

MORRIS TRIEBER,

Appellant,

vs.

JOHN O. ENGLAND, Trustee in Bankruptcy of
the Estate of Gayne Sales Co., Inc., a Corpora-
tion, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

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Phillips & Van Orden Co., 870 Brannon Street, San Francisco, Calif.—7-6-56

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JOSEPH A. BROWN,
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San Francisco, California,
For Appellant.

JAMES M. CONNERS,
Board of Trade Building,
444 Market Street,
San Francisco, California,
For Appellee.

United States District Court, for the Northern
District of California, Southern Division

No. 43523

In the Matter of

GAYNE SALES CO., INC., a California Corpo-
ration, Bankrupt.

At San Francisco, in said District, on the 24th day
of August, 1954.

ORDER OF ADJUDICATION AND
REFERENCE, ETC.

The Petition of Gayne Sales Co., Inc., a California Corporation, filed on the 24th day of August, 1954, that it be adjudged a bankrupt under the Act of Congress relating to Bankruptcy, having been heard and duly considered, and no opposition being made thereto,

It Is Adjudged that the said Gayne Sales Co., Inc., etc., is a bankrupt under the Act of Congress relating to Bankruptcy.

It Is Ordered that the above-entitled proceeding be, and it is hereby referred to Burton J. Wyman, one of the Referees in Bankruptcy of this Court who will be in charge thereof, and to Bernard J. Abrott, Referee in Bankruptcy of this Court, in the event Burton J. Wyman shall be unable to act to take such further proceedings therein as are required and permitted by said Act, and that the said Gayne Sales Co., Inc., shall henceforth attend be-

fore the said Referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

It Is Further Ordered that all notices required to be published in the above-entitled matter, and all orders which the Court may direct to be published, be inserted in "The Recorder," a newspaper published in the County of San Francisco, State of California, within the territorial district of this Court, and the County within which said bankrupt resides.

Dated August 24th, 1954.

/s/ EDWARD P. MURPHY,
District Judge.

[Endorsed]: Filed August 24, 1954.

[Title of District Court and Cause.]

PROOF OF CLAIM

State of California,
City and County of San Francisco—ss.

Morris Trieber, of San Francisco, in the County of San Francisco, and State of California, personally known to me, being duly sworn, deposes and says:

That he is the owner of the business known as M. Trieber, and trades under that name.

That Gayne Sales Co., Inc., a California corporation, the above named bankrupt or debtor, by or against whom a petition for adjudication of bankruptcy or for an arrangement or for reorganization has been filed, was at and before the filing of such petition and still is justly and truly indebted or liable to claimant in the sum of \$3162.24.

That the consideration of said debt or liability is as follows: (a) A balance due upon an open book account for goods sold and delivered by claimant to said bankrupt or debtor within four years last past, bill of items of which account are attached hereto as Exhibit "A" and made a part hereof.

That the items of said debt became due upon the dates as respectively set forth upon said bills of items marked "Exhibit A."

For salary for services performed for the corporation pursuant to an oral agreement	\$1600.00
For money paid by claimant on a note owing by the bankrupt, which note claimant had guaranteed, and on which note claimant paid	750.00
For goods, wares and merchandise sold and delivered to the bankrupt.....	382.65
Paid by claimant on behalf of bankrupt on a judgment rendered against the bankrupt, which judgment this claimant guaranteed	408.89
	<hr/>
	\$3141.54

also:

For the further sum of costs expended for an action filed thereon in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled "Morris Trieber, Plaintiff, vs. Gayne Sales Co., Inc., a corporation, Defendant," numbered 437 732, as follows,

Paid to County Clerk for filing action	\$16.50	
Paid to Sheriff	2.70	
Notary fees	1.50	20.70
		<hr/>
		\$3162.24

That no part of said debt or liability has been paid; that there are no set-offs or counterclaims to the same; that no note or other negotiable instrument has been received for said account or any part thereof (except the note....hereto attached as Exhibit "B") and that no judgment has been rendered thereon (except as hereinabove set forth). That claimant does not hold, and has not, nor has any person, by his or its order, or to deponent's knowledge or belief, for claimant's use, had or received, any security or securities for said debt or liability except as disclosed herein.

This claim is free from usury as defined by the laws of the State where the debt was contracted.

Claimant also herewith authorizes John O. England, or any one of them, with full power of substi-

tution, to attend all meetings of creditors of the bankrupt or debtor aforesaid and all adjournments thereof at the places and times appointed by the Court, and for claimant and in his or its name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to bankruptcy, to vote for a trustee or trustees of the estate of said bankrupt or debtor, and for a committee of creditors, to accept any arrangement or wage earner's plan proposed by said bankrupt or debtor, and to receive payment of dividends and payment or delivery of money or of other consideration due claimant under such arrangement, reorganization, or wage earner's plan and for any other purpose in claimant's interest whatsoever, and with like powers to attend and vote at any other meeting or meetings of creditors or sitting or sittings of the Court which may be held therein for any of the purposes aforesaid, and to receive or waive any of the notices required by Section 58 of the Bankruptcy Act, and claimant does hereby revoke all letters of attorney heretofore given by claimant in this matter.

In witness whereof, and with the intention of having one individual signature suffice for the above deposition and this letter of attorney, said claimant has hereunto subscribed his name, or, if a corporation, has caused such subscription to be made by said officer or agent as its corporate act, or, if a partnership, has caused such subscription to be made by said member thereof on its behalf, or, if an

individual or partnership acting through an agent or attorney, has caused such subscription to be made by such attorney or agent as the act of said principal, this 15th day of October, 1954.

(Personal signature here only):

/s/ MORRIS TRIEBER,

For:

.....,

(Name of Firm.)

Subscribed, sworn to and acknowledged before me this 15th day of October, 1954.

[Seal] /s/ MAE L. MILLER,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires May 4, 1958.

[Endorsed]: Filed October 18, 1954.

[Title of District Court and Cause.]

TRUSTEE'S OBJECTIONS TO THE ALLOW-
ANCE OF THE CLAIM OF MORRIS
TRIEBER AND PETITION FOR TURN-
OVER ORDER

To the Honorable Burton J. Wyman, Referee in
Bankruptcy:

Now comes John O. England, as Trustee of the
bankrupt above named, and files his objections to

the allowance of the claim of Morris Trieber as a claim against the said bankrupt estate, or otherwise, in the sum of \$3,162.24, or at all, and for grounds of objection alleges:

Denies that at the time of the filing of the Petition in Bankruptcy herein, said bankrupt was indebted to claimant in the sum of \$3,162.24, or in any sum, or at all.

As a Further, Separate and Distinct Defense to the Allowance of Said Claim, and as Grounds for Further Relief, the Trustee Alleges:

I.

That during all of the times herein referred to, the bankrupt corporation was duly organized and existing as a corporation under and by virtue of the laws of the State of California.

II.

That said corporation was originally organized under the laws of the State of California as the Arian-Gayne & Associates, Inc., and thereafter the said Articles of Incorporation of said corporation were amended and by said amendment the name thereof was changed to Gayne Sales Co., Inc., a corporation, the present name of the bankrupt.

III.

That from the inception of the said incorporation and during all of the times mentioned herein, the said Morris Trieber was one of the incorporators of the said corporation, and together with

I. E. Arian, Jerome R. Gayne and Samuel Gayne, was during all of the times herein referred to, a director of said corporation, and that the said Morris Trieber was at all times herein referred to an officer of said corporation, to wit, the secretary thereof.

IV.

That heretofore and on or about the 8th day of March, 1951, at a meeting of the Board of Directors of said corporation, at which all of the directors aforementioned were present, and at which meeting the said Morris Trieber was present as director and as secretary of the said corporation, the said corporation adopted the following resolution:

“Resolved, that the Secretary of this corporation, Morris Trieber, shall forthwith make application to the Commissioner of Corporations of the State of California for permission to issue capital stock of this corporation, as follows:

“To I. E. Arian, for the transfer by him to this corporation of the business carried on and conducted by him at 1151 Mission Street, including generally U. S. merchandise, new and used clothing, camping equipment, hunting clothes, shoes and leggings, and general merchandise of all kinds, including fixtures and office equipment and the good will of said company now operated under the name of U. S. Army Surplus and I. E. Arian, one hundred (100) shares of the capital stock of this corporation of the par value of Ten Thousand Dollars (\$10,000.00), and to pay to him the sum of Twenty-

five Hundred Dollars (\$2500), which sum has already been paid.

To Jerome R. Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the sum of Ten Thousand Dollars (\$10,000) in cash.

To Samuel Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the transfer to this corporation of merchandise of the fair and reasonable value of \$6,708.18, and the payment in cash of \$3,291.82.

To Morris Trieber, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the transfer by him to this corporation of merchandise of the fair and reasonable value of \$8,967.10 and payment in addition thereto of cash in the sum of \$1,032.90.”

V.

That said resolution was adopted upon the reliance of the said Board of Directors upon the representations of the said Morris Trieber at that said meeting that he, the said Trieber, owned surplus merchandise of the kind and character which said corporation was organized to sell of the fair and reasonable market value of \$15,675.28; that he, the said Morris Trieber, was indebted to Samuel Gayne, one of the directors of the said corporation, in the sum of \$6,708.18; that he, the said Trieber, and Samuel Gayne had agreed between themselves that

said indebtedness of Trieber to Gayne was to be paid by the said Trieber delivering to the said corporation on behalf of Gayne, merchandise of the reasonable value of \$6,708.18 in partial payment of stock to be issued to Samuel Gayne by the said corporation upon approval by the Department of Investment, Division of Corporations of the State of California, and that he, the said Trieber, would in consideration of the said Samuel Gayne, I. E. Arian and Jerome Gayne subscribing for \$10,000 worth of stock to be paid for as follows:

By I. E. Arian, by merchandise of the reasonable value of his \$10,000.00 subscription;

By Jerome Gayne, by the payment of cash for his \$10,000.00 worth of stock;

By Samuel Gayne, by the payment by Trieber in his behalf of merchandise of the value of \$6,708.18, and cash in the sum of \$3,291.82.

That he, Trieber, would deliver to said corporation, in payment of his subscription, merchandise of the reasonable value of \$8,967.10 and cash in the sum of \$1,032.90.

That said directors, relying upon said representations, and believing the same to be true, did adopt the resolution aforementioned.

That thereafter and on or about the 22nd day of March, 1951, in line with said resolution, and with the full knowledge and consent of the said Trieber, and believing the representations aforementioned of the said Trieber, and in reliance thereon, the

officers and directors of said corporation filed an Application for Permit to Sell and Issue Stock, to wit, one hundred (100) shares to each of the persons heretofore named, for Ten Thousand Dollars (\$10,000.00), which said stock was to be paid for as set forth in said resolution aforementioned.

VI.

That thereafter and on the 28th day of March, 1951, the Commissioner of Corporations, State of California, issued a permit for the issuance and the sale of four hundred (400) shares of stock to the said persons named, for the consideration set forth in the resolution aforementioned; that said permit further provided that the stock shall be issued by the 28th day of September, 1951; that said permit further required the appointment of an escrow holder to be approved by the said Commissioner, which escrow holder was to hold the stock issued to the persons aforementioned until the further order of the said Commissioner of Corporations; that no further order of the said Commissioner of Corporations was thereafter made.

VII.

That thereafter the directors of said corporation, with the full knowledge and consent of the said Morris Trieber, and in reliance on the said representations of the said Trieber, and with the approval of the Commissioner of Corporations, named and designated one Joseph A. Brown, an attorney at law, as said escrow holder; that the resolution

appointing the said Joseph A. Brown as said escrow holder was adopted at a special meeting duly and regularly held on the 29th day of March, 1951, and a certified copy thereof was duly filed with the Division of Corporations by the said Morris Trieber as secretary on the 4th day of April, 1951, and said escrow holder was approved by the Commissioner of Corporations on the 6th day of April, 1951.

VIII.

That thereafter the said Morris Trieber, on or about the 30th day of April, 1951, represented to the directors and officers of said corporation that he had delivered to the said corporation merchandise of the reasonable value of \$15,675.28, being the merchandise hereinabove referred to and delivered to said corporation in payment of stock as follows:

\$6,708.18 against the stock to be issued to Samuel Gayne;

\$8,967.10, in payment of the stock to be issued to Morris Trieber.

That in reliance upon the said representations of the said Trieber, so made on or about April 30, 1951, and believing the same to be true, the said corporation, on the said 30th day of April, 1951, pursuant to the Permit aforementioned, issued one hundred (100) shares of stock to each of the following named persons, for which stock said persons paid, or in the instance of Morris Trieber and Samuel Gayne, allegedly paid, the consideration therefor:

I. E. Arian, 100 shares of the par value of \$100.00 each, \$10,000.00 paid for by the said I. E. Arian in merchandise of the reasonable value of \$10,000;

Jerome R. Gayne, 100 shares of the par value of \$100.00 each, for \$10,000.00 cash;

Samuel Gayne, 100 shares of the par value of \$100.00 each, in consideration of the alleged delivery to the said corporation in his behalf of merchandise of the reasonable value of \$6,708.18, as represented to said corporation by the said Morris Trieber, was delivered by him to said corporation, and cash in the sum of \$3,291.82;

Morris Trieber, 100 shares of the par value of \$100.00 each, in consideration of the alleged delivery to said corporation of merchandise of the reasonable value of \$8,967.10, as was represented by said Trieber, was by him delivered to said corporation, and cash in the sum of \$1,032.90.

That certificates numbered 1, 2, 3 and 4, respectively, were issued to said parties and delivered to the escrow holder on the 12th day of July, 1951, on behalf of said parties respectively, which escrow holder in turn issued a receipt to each of said parties for his said shares, setting forth that he held said certificates for the said parties, and filed a copy thereof with the Commissioner of Corporations of the State of California.

IX.

That thereafter and within three years last past, the officers and directors of said corporation, other

than the said Trieber, for the first time discovered that the representations of the said Trieber made to the said corporate officers and directors as above alleged on or about the 8th day of March, 1951, were false and untrue and were known by the said Morris Trieber to be false and untrue, and discovered that said Trieber did not own or control any surplus or other property which was of the value of \$15,675.28, or of any value whatsoever; that but for said false and untrue representations, said directors would not have adopted the said resolution so adopted on said day, nor would they have taken the further steps hereinabove outlined as having been taken, before the Division of Corporations of the State of California; that within the three years last past, the said officers and directors of said corporation, for the first time, discovered that the representations of the said Morris Trieber made to the officers and directors of said corporation on or about the 30th day of April, 1951, to the effect that he had delivered to the said corporation merchandise of the fair and reasonable value of \$15,675.28 in partial payment of the stock as hereinabove alleged, for which stock was issued to him and Samuel Gayne, were in each and every instance false, fraudulent and untrue, and that the said Morris Trieber did not deliver any merchandise to the said corporation of any value whatsoever, either in payment of any stock issued to him, or in payment of the stock issued to the said Samuel Gayne as aforementioned, and that the said Morris Trieber falsely,

fraudulently and wilfully misrepresented to the said corporation the delivery of said merchandise. That the said officers and directors of the said corporation believed said representations to be true and belief thereon, and but for said belief and reliance, would not have issued the stock hereinabove referred to to the said Morris Trieber and/or Samuel Gayne.

That by reason of the said Morris Trieber's false, fraudulent and wilful misrepresentations as hereinabove set forth, and the reliance thereon by the said corporation's directors and officers, the said corporation and the creditors of said corporation have been damaged in the sum of \$15,975.28, plus interest at the rate of seven per cent (7%) per annum on said sum from the 7th day of April, 1951, to date.

X.

That in doing the things herein alleged, the said Trieber acted wilfully, maliciously and wantonly and has been guilty of oppression, fraud and malice and that said Trieber's acts were in direct violation of the Rules and Regulations and Laws applicable to the sale of corporate stock and the payment therefor, and by reason thereof caused said corporation embarrassment, caused said corporation to issue false and fraudulent statements to creditors and banks, to the further damage of the said corporation in the sum of \$10,000.00, and by reason of the foregoing, the said corporation demands exem-

plary and punitive damages against the said Morris Trieber in the sum of \$15,000.00.

Wherefore, said Trustee prays that an Order be made and entered disallowing the claim of the said Morris Trieber in the sum of \$3,162.24, and the whole thereof, and that no allowance be made for any sum whatsoever on said claim, and for an Order disallowing said claim unless and until said claimant pays to said Trustee the sum of \$40,675.28, together with interest at legal rate on \$15,675.28 from April 30, 1951, forward, and that said claimant be ordered to pay said sum to the Trustee herein, together with said Trustee's costs incurred herein, and for such further and different Order as may be just and proper in the premises.

JOHN O. ENGLAND,
Trustee,

By /s/ JAMES M. CONNERS,
One of His Attorneys.

Duly verified.

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the reading and consideration of the Objections filed herein by John O. England, Trustee of the estate of the bankrupt above named, to the

allowance of the claim of Morris Trieber, now, on motion of James M. Conners, attorney for said Trustee,

It Is Hereby Ordered that Morris Trieber appear and show cause before me, the undersigned Referee in Bankruptcy, at my courtroom, Room 609, Grant Building, 1095 Market Street, San Francisco, California, on Thursday, the 7th day of July, 1955, at the hour of 2 o'clock p.m. of said day, if any he has, why the relief prayed for by the Trustee in said Objections to allowance of the claim of Morris Trieber, should not be granted.

It Is Further Ordered that service of this Order be made by delivering a copy thereof, together with a copy of the Trustee's Objections herein referred to, to the said Morris Trieber at least 10 days prior to the return date hereof.

Dated this 20th day of June, 1955.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed June 20, 1955.

[Title of District Court and Cause.]

ANSWER AND RETURN OF MORRIS
TRIEBER TO ORDER TO SHOW CAUSE
AND MOTION TO DISMISS PETITION
OF TRUSTEE AND TO DISCHARGE
ORDER TO SHOW CAUSE FOR WANT
OF JURISDICTION

To the Honorable Burton J. Wyman, Referee in
Bankruptcy of the Above-Entitled Court in and
for the City and County of San Francisco in
and for the State and District Aforesaid:

Now comes Morris Trieber upon whom it has been
heretofore served an order issued by your Honor
commanding him to appear before your Honor on
Thursday, the 7th day of July, 1955, at the hour
of two o'clock p.m., then and there to show cause
why the relief prayed for by John O. England,
Esq., as Trustee of the estate of the bankrupt above
named, should not be granted; and, as commanded
by your Honor in the said order which was issued
the 20th day of June, 1955, files this, his answer
and return to the aforesaid order, and moves that
the said order be discharged and held for naught;
and in that behalf most respectfully represents and
shows to your Honor:

I.

That this Honorable Court has not, nor has your
Honor as Referee in bankruptcy of said Honorable
Court any jurisdiction to hear or determine the pe-
tition of said Referee which is annexed to the said

order to show cause, or to make any order thereon or to grant any of the relief prayed for by the said Trustee; and in this behalf the said Morris Trieber further shows to your Honor that this proceeding presents a case of a contest between the Trustee in bankruptcy and a third person who is not a party to the bankruptcy proceeding and whose rights, claims and defense cannot be summarily adjudicated by your Honor or by this Honorable Court in this proceeding; and that it further appears that the aforesaid petition of said referee in bankruptcy is a purported claim against the said Morris Trieber for damages alleged to have been suffered by the said bankrupt by alleged fraudulent and wilful misrepresentation alleged to have been made by said Morris Trieber, and that it is further alleged in Paragraph X of said petition that the said bankrupt corporation suffered additional damages in the sum of \$10,000; and that it is further alleged that the said corporation demands exemplary and punitive damages against the said Morris Trieber in the sum of \$15,000; and the said Trustee in the party of the said petition prays for an order by your Honor that the said Morris Trieber pay to said Trustee the sum of \$40,675.28, together with interest at legal rate on the sum of \$15,675.28 from April 30, 1951, forward; that your Honor has no jurisdiction to make any such order, and that this Honorable Court has no jurisdiction to make any such order; that such an order or judgment could be made only if a trial before a court of competent jurisdiction, and after a verdict of a jury duly em-

paneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived; and in this behalf the said Morris Trieber further represents and shows to your Honor that this Honorable Court would in any event have no jurisdiction of any action brought by the said Trustee in bankruptcy to recover said sum or any other sum of money claimed to be due from said Morris Trieber to said bankrupt, by reason of any alleged fraud, or otherwise, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction of any such action is in the Court of the State of California whose jurisdiction cannot be ousted by any order that your Honor might make.

II.

And for Further Answer and Return to the Said Order to Show Cause and as Further Ground for the Dismissal and Discharge of the Same and for Further Ground of Objection to the Jurisdiction of This Court to Hear and Determine Any of the Matters and Things Set Forth in the Aforesaid Petition of the Said Trustee in Bankruptcy, the Said Morris Trieber Alleges and Shows:

That all and singular the matters and things set forth by the said trustee in bankruptcy as grounds for the order and relief sought herein by the said trustee, and all and singular the claims of the said trustee therein set forth cannot be maintained by said trustee in this proceeding for the reason that

the said trustee is barred and precluded from maintaining the same by virtue of a said judgment and order heretofore, to wit, on the 3rd day of August, 1954, duly given, made and entered in and by the Superior Court of the State of California in and for the City and County of San Francisco, and numbered therein 431,888 in which Gayne Sales Co., Inc., a corporation, the bankrupt in this proceeding, was plaintiff and the said Morris Trieber was defendant in which a certain second amended complaint for damages for fraud, breach of contract and money had and received was sustained by said Superior Court without leave to amend; that the said second amended complaint was based upon the same purported cause of action and involved in all respects the said matters and things and all and singular the same claims as are set forth in the present proceeding by the said Referee in bankruptcy, all of which from the said second amended complaint in the action last aforesaid, a copy of which is hereunto annexed as Exhibit "A" and made a part hereof, fully and at large appears.

That a copy of the Minute Order sustaining the said demurrer of the said Morris Trieber to the said complaint of the said Gayne Sales Co., Inc., a corporation, without leave to amend is hereunto annexed and made a part hereof in like manner and with like effect as if heretofore set forth in its entirety.

And in this behalf the said Morris Trieber further shows to your Honor that thereafter and on the

11th day of August, 1954, the said Gayne Sales Co., Inc., appealed from the order of said Superior Court to the Supreme Court of the State of California from the order of the said Superior Court sustaining the demurrer of the said Morris Trieber to the second amended complaint of Gayne Sales Co., a corporation, the bankrupt herein, without leave to amend; and the said Morris Trieber further shows that thereafter, and prior to the first day of December, 1954, the said Supreme Court of the State of California, in the exercise of the jurisdiction conferred upon it by the Constitution of the State of California, duly transferred the said appeal to the District Court of Appeal of the State of California in and for the First Appellate District Division Two, and that on the first day of December, 1954, the said Gayne Sales Co., Inc., a corporation, filed in said District Court of Appeals a certain brief, in which the said corporation sets forth in substance and effect all of the matters and things now set forth in the present proceeding by the said Referee in bankruptcy; that thereafter and on the 20th day of December, 1954, the said Morris Trieber filed in the said District Court of Appeals, a notice of motion to dismiss the said appeal of the said Gayne Sales Co., Inc., from the said order sustaining the said demurrer to the second amended complaint without leave to amend, and filed therewith a Memorandum of Points and Authorities in support of the said motion;

That thereafter and on the 10th day of January, 1955, the said motion to dismiss the said appeal

from the said order of said Superior Court, came on regularly to be heard before the said District Court of Appeals and was argued by counsel; in consideration whereof it was by the said District Court of Appeals, ordered, adjudged and decreed that the said motion be granted and that said appeal of the said Gayne Sales Co., Inc., be dismissed; and that by reason of all and singular the premises, the said judgment in the aforesaid action of Gayne Sales Co., Inc., v. Morris Trieber, is *res judicata* as to all and singular the matters before your Honor and before this Honorable Court in the instant cause, and the said Gayne Sales Co., Inc., and its said trustee in bankruptcy are, and each of them is, estopped and concluded from seeking the order prayed for herein and from obtaining any of the relief sought by them, or by either of them; and your Honor and this Honorable Court are likewise estopped and precluded from granting any relief in the premises to the said bankrupt or to the said trustee in bankruptcy.

III.

And for Further Answer and Return to the Said Order to Show Cause Said Morris Trieber Respectfully Shows to Your Honor:

That the purported cause of action and each and every of the said purported causes of action and any and all matters and things whatsoever set forth herein by the said Trustee in bankruptcy are barred by the Statute of Limitations as set forth in Subdivision 4 in Section 338 of the Code of Civil Procedure of the State of California.

Wherefore the said Morris Trieber prays that the said order to show cause be dismissed and discharged, that the said trustee take nothing thereby, that it be considered and held that this Court has no jurisdiction of this proceeding and that said Morris Trieber be hence dismissed without delay.

/s/ JOSEPH A. BROWN,

Attorney for Morris Trieber.

Duly verified.

EXHIBIT "A"

In the Superior Court of the State of California
in and for the City and County of San Francisco

No. 431,888

GAYNE SALES CO., INC., a Corporation,

Plaintiff,

vs.

MAURICE TRIEBER,

Defendant.

SECOND AMENDED COMPLAINT FOR DAMAGES FOR FRAUD, BREACH OF CONTRACT AND MONEY HAD AND RECEIVED

Comes now the plaintiff and complains of the defendant above-named and for cause of action alleges:

I.

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That heretofore and prior to the commencement of this action said plaintiff corporation was organized as the Arian-Gayne & Associates, Inc., and thereafter the Articles of Incorporation of said corporation were amended and the name thereof changed to the name of the plaintiff corporation.

III.

That during all of the times herein mentioned defendant was one of the incorporators of said corporation. That defendant together with I. E. Arian, Jerome R. Gayne and Samuel Gayne and during all of the times herein mentioned the above named incorporators were directors of said corporation and the defendant was also an officer of said corporation, to wit, the secretary thereof.

IV.

That heretofore and on or about March 8, 1951, at the first meeting of the Board of Directors of the plaintiff corporation, duly and regularly held, at which all directors were present and acting, the said defendant Maurice Trieber, orally represented to the officers and directors of said corporation:

A. That he, the said defendant, was indebted to one Samuel Gayne, a director of said corporation, in the sum of \$6,708.18;

B. That he, the said defendant, was the owner of and had in his possession general surplus merchandise of the type, kind and character which said corporation was organized to sell, of the fair and reasonable value of \$15,675.28;

C. That he and the said Samuel Gayne had, between themselves, orally agreed:

(1) That he, the said defendant, was then and there indebted to Samuel Gayne in the sum of \$6,708.18;

(2) That said Samuel Gayne orally agreed to accept payment of said indebtedness in cash or in merchandise (as described in subparagraph B above), providing said corporation would accept said merchandise as part payment of 100 shares of its capital stock to be issued to Samuel Gayne.

V.

That said defendant, Maurice Trieber, orally offered to deliver the said merchandise aforementioned to the fair and reasonable value of \$15,675.28 to the said corporation upon the following considerations and under the following terms and conditions:

A. If one I. E. Arian, a director of said corporation who was then and there present, would transfer to the said corporation all surplus merchandise owned by him in a certain business conducted at 1151 Mission Street, including new and used clothing, camping equipment, hunting clothes, shoes and

leggings, and various other general merchandise including the fixtures, all of the fair and reasonable value of \$12,500.00, in consideration of the said corporation issuing to him one hundred (100) shares of its capital stock of the par value of Ten Thousand Dollars (\$10,000.00), and in further consideration of the corporation paying to the said I. E. Arian a sum of \$2,500.00 in cash.

B. If one Jerome R. Gayne, a director of said corporation who was then and there present, would purchase one hundred (100) shares of the capital stock of said corporation and pay therefor the sum of Ten Thousand Dollars (\$10,000.00) in cash.

C. If Samuel Gayne, a director of said corporation and then present, would purchase one hundred (100) shares of the capital stock of said corporation of the par value of Ten Thousand Dollars (\$10,000.00), and pay therefor follows: merchandise of the character described in Paragraph IV, subparagraph B hereof, of the fair and reasonable value of \$6,708.18 to be delivered to said corporation by the said defendant Maurice Trieber, which delivery of merchandise was to be made to said corporation on behalf of the said Samuel Gayne and in payment to the said Samuel Gayne of a sum of \$6,708.18, then and there admittedly owing to him by the said defendant Maurice Trieber, and in further consideration of the said Samuel Gayne paying to said corporation for said stock the additional sum of \$3,291.82 in cash.

D. If said corporation would issue to the said defendant Maurice Trieber one hundred (100) shares of the capital stock of said corporation of the par value of Ten Thousand Dollars (\$10,000.00), for which the said Maurice Trieber would pay as follows: delivery of general merchandise to said corporation of the fair and reasonable value of \$8,967.10 as part payment thereof, and payment of the balance of the said \$10,000.00 to be made by the said Maurice Trieber in cash, to wit, the sum of \$1,032.90.

That the offer aforementioned was made upon the condition that the said corporation make application to the Commission of Corporations, Department of Investments, of the State of California, for a permit for the issuance and sale of stock to the persons above named upon the terms and conditions hereinabove mentioned.

That the said I. E. Arian, Samuel Gayne and Jerome R. Gayne orally accepted the offer of the said defendant Trieber, and each agreed to purchase one hundred (100) shares of the capital stock of said corporation of the par value of Ten Thousand Dollars (\$10,000.00) upon the terms of the offer of the said Maurice Trieber and the directors of said corporation accepted the said offer by its acts as hereinafter set out.

VI.

That thereafter and at the said directors' meeting hereinabove referred to held on the 8th day of March, 1951, acting upon and in full reliance on

the representations and offers of the defendant, Maurice Trieber, the directors of plaintiff corporation adopted the following resolution:

Resolved that the Secretary of this corporation, Morris Trieber, shall forthwith make application to the Commissioner of Corporations of the State of California for permission to issue capital stock of this corporation, as follows:

To I. E. Arian, for the transfer by him to his corporation of the business carried on and conducted by him at 1151 Mission Street, including generally U. S. merchandise, new and used clothing, camping equipment, hunting clothes, shoes and leggings, and general merchandise of all kinds, including fixtures and office equipment and the good will of said company now operated under the name of U. S. Army Surplus and I. E. Arian, one hundred (100) shares of the capital stock of this corporation of the par value of Ten Thousand Dollars (\$10,000), and to pay to him the sum of Twenty-five Hundred Dollars (\$2500), which sum has already been paid.

To Jerome R. Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the sum of Ten Thousand Dollars (\$10,000) in cash.

To Samuel Gayne, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the

transfer to this corporation of merchandise of the fair and reasonable value of \$6,708.10, and the payment in cash of \$3,291.82.

To Morris Trieber, one hundred (100) shares of the capital stock of this corporation representing Ten Thousand Dollars (\$10,000) par value, for the transfer by him to this corporation of merchandise of the fair and reasonable value of \$8,967.10 and payment in addition thereto of cash in the sum of \$1,032.90."

VII.

That thereafter and on the 22nd day of March, 1951, under the authority and in line with the resolutions aforementioned, and in further reliance of the representation of defendant as aforementioned, the plaintiff corporation duly filed with the Department of Investments, Division of Corporations of the State of California, an application for a permit to sell and issue four hundred (400) shares of the capital stock of said corporation of the par value of Forty Thousand Dollars (\$40,000) to the persons named in the said resolution and upon the terms and conditions set forth in said resolution; that said application was executed by defendant Maurice Trieber on behalf of said corporation.

VIII.

That thereafter and on the 28th day of March, 1951, the Commissioner of Corporations of the State of California issued and delivered to the plaintiff corporation a Permit for the issuance and sale of

four hundred (400) shares of the capital stock of said corporation to I. E. Arian, Samuel Gayne, Jerome R. Gayne and Maurice Trieber for the considerations and on the conditions set forth in the Resolution, above referred to, and in the application filed by said corporation based upon said resolution; that said permit further provided that said stock shall be issued prior to September 28, 1951.

That said permit further provided that the corporation designate an escrow holder to be approved by the Commissioner of Corporations, which said escrow holder was to hold the stock to be issued to the persons above named until the further order of the Commissioner of Corporations. That no further order of the Commissioner of Corporations was thereafter made.

IX.

That on or about the 29th day of March, 1951, at a special meeting of the Board of Directors of plaintiff corporation, duly and regularly called and held, at which all directors were present, a resolution was adopted pursuant to the terms of the permit aforementioned, designating and selecting one Joseph A. Brown, an attorney at law and the attorney for said corporation, as the escrow holder for all of the stock to be issued by said corporation pursuant to the Permit aforementioned.

That thereafter and on or about April 4, 1951, the defendant Maurice Trieber, as secretary of said corporation, filed with the Division of Corporations,

Department of Investments, State of California, a certified copy of the said resolution selecting the said Joseph A. Brown as such escrow holder.

That thereafter and on the 6th day of April, 1951, the Commissioner of Corporations of the State of California issued his order approving the selection of the said Joseph A. Brown as escrow holder by the said corporation, which said escrow holder was to hold said stock to be issued to the persons above named until the further order of the Commissioner of Corporations and that no further orders have to date been issued.

X.

That thereafter and on or about the 30th day of April, 1951, said defendant Trieber represented to the directors and the officers of said plaintiff corporation that he had delivered to the said corporation the merchandise of the fair and reasonable value of \$15,675.28, that merchandise of the fair and reasonable value of \$6,708.18 was so delivered on behalf of Samuel Gayne and in part payment of the 100 shares of stock subscribed to by the said Samuel Gayne, and \$8,967.10 in merchandise of the fair and reasonable value of said sum in part payment of the 100 shares subscribed to by said defendant Maurice Trieber.

That in reliance upon the said representations of the defendant, Maurice Trieber, the said corporation on the 30th day of April, 1951, pursuant to the provisions of the Permit aforementioned, issued

four certificates, each for one hundred (100) shares of the capital stock of said corporation, each of the total par value of Ten Thousand Dollars (\$10,000.00), which said certificates were issued to the following named persons for the following considerations:

Certificate No. 1, to I. E. Arian for 100 shares of the capital stock of said corporation, of the par value of \$10,000.00 in consideration of the transfer to the said corporation of the merchandise and fixtures hereinabove referred to, which said merchandise and fixtures were so delivered to the said corporation by the said I. E. Arian.

Certificate No. 2, to Jerome R. Gayne for 100 shares of stock of the par value of \$10,000.00 in consideration of the payment to said corporation of \$10,000.00 in cash, which said sum of \$10,000.00 in cash was paid by the said Jerome R. Gayne.

Certificate No. 3, to Samuel Gayne for 100 shares of the capital stock of said corporation of the par value of \$10,000 in consideration of the delivery to the said corporation of merchandise of the fair and reasonable value of \$6,708.19 and the payment to the said corporation of \$3,291.82 in cash. That the said merchandise aforementioned to be delivered to said corporation by defendant Maurice Trieber was never delivered to the said corporation as herein in this complaint set forth, that the said \$3,291.82 in cash was paid to said corporation by the same Samuel Gayne.

Certificate No. 4, to Maurice Trieber in consideration of the delivery to the said corporation of merchandise of the fair and reasonable value of \$8,967.10 and the payment in cash of \$1,032.90; that the said merchandise was not delivered to said corporation as in this complaint set forth; that the said sum of \$1,032.90 was paid to said corporation by said Maurice Trieber.

That the said Certificates 1, 2, 3 and 4 aforementioned were by said corporation duly issued and delivered to the parties named in said certificates, by delivery thereof to the duly appointed and approved escrow holder, Joseph A. Brown, on behalf of said parties, and that said escrow holder on July 12, 1951, issued his receipt therefor and delivered a copy of said receipt setting forth that he holds said certificates for the parties to whom said certificates were issued, including the defendant, and filed a copy thereof with the Commissioner of Corporations of the State of California.

XI.

That the representations and offer of the said defendant Maurice Trieber herein set forth in Paragraph IV, subparagraph B thereof, were false, fraudulent and untrue in that at said time and place the defendant was not the owner and did not have in his possession general surplus merchandise of the type and character which said corporation was organized to sell or any merchandise of the fair and reasonable value of \$15,675.28 or of any sum whatsoever.

That the representations of the said defendant Maurice Trieber herein set forth in Paragraph V were false, fraudulent and untrue in that the merchandise therein offered to be delivered by the said Maurice Trieber did not then have merchandise to deliver to said corporation of the value of \$15,675.28 or merchandise of any value whatsoever.

That the representations of the said Maurice Trieber hereinabove set forth in Paragraph X were false, fraudulent and untrue in that the said defendant Trieber did not deliver to the said corporation merchandise of the fair and reasonable value of \$15,675.28 or any merchandise whatsoever of any value whatsoever and did not deliver to the said corporation merchandise of the fair and reasonable value of \$6,708.18 on behalf of Samuel Gayne or any merchandise of any value and that he did not deliver merchandise of the value of \$8,967.10 in part payment of the 100 shares subscribed to by him, the said defendant Trieber, or any merchandise of any value whatsoever.

XII.

That plaintiff was induced to sell, issue and deliver 200 shares of stock of said corporation, as aforementioned, to the defendant and to Samuel Gayne, by said false and fraudulent representations, and but for said false and fraudulent representations, would not have issued and delivered said shares of stock.

XIII.

That, excepting as herein set forth as to the payments of \$3,291.82 in cash by Samuel Gayne and \$1,037.90 in cash by defendant, Maurice Trieber, said 200 shares of stock were not paid for.

XIV.

That by reason of the defendant's fraud and misrepresentation as hereinabove set out, plaintiff has been damaged in the sum of \$15,675.28, plus interest at the rate of seven per cent (7%) on said sum from April 30, 1951, to date.

XV.

That in doing the things herein alleged, the defendant acted wilfully, maliciously and wantonly, and has been guilty of oppression, fraud and malice, and that said defendant's acts were in direct violation of Section 26104 of the Corporations Code of the State of California, Subdivisions (a), (b) and (f) thereof, in that said defendant knowingly aided in the issue or sale of or caused or assisted in causing to be issued, executed or sold, the stock of the plaintiff corporation in non-conformity with the permit of the Commissioner then in effect authorizing such issue or contrary to the provisions of the subdivisions as hereinabove set forth, in that in the application to the Commissioner of Corporations for the permit to issue and sell the stock of the plaintiff corporation, defendant knowingly made false statements or representations as hereinabove set forth with knowledge of their falsity

and with said knowledge of the falsity and of his own representations caused to be issued the stocks hereinabove mentioned to himself and to Samuel Gayne; and in that in violation of the permit issued by the Division of Corporations, the said defendant caused the stocks above mentioned to be issued to himself and Samuel Gayne without payment therefor as provided in the permit issued by the Division of Corporations as aforementioned. By reason of the foregoing defendant caused said corporation to issue false and fraudulent financial statements to creditors and banks, damaged and injured the credit standing of said corporation causing said corporation embarrassment and ridicule to the damage of the plaintiff corporation in the further sum of Ten Thousand Dollars (\$10,000.00) and by reason of the foregoing, plaintiff further demands exemplary and punitive damages against the defendant in the sum of Fifteen Thousand Dollars (\$15,000.00).

Wherefore, etc.

As and for a Second, Separate and Distinct Cause of Action Against Said Defendant, Plaintiff Alleges:

I.

Plaintiff incorporated herein by reference Paragraphs I, II, and III of plaintiff's first cause of action as part of this cause of action with the same force and effect as if the same were herein set forth word for word.

II.

That within two years last past in the City and County of San Francisco, State of California, and in the County of Marin, State of California, defendant above named became indebted to plaintiff as and for sums expended by plaintiff on behalf of defendant at defendant's specific instance and request, for cash advanced to defendant at defendant's specific instance and request, for sums paid to defendant by plaintiff on the representation of defendant that he had expended said sums for traveling and other expenses on behalf of plaintiff but which in truth and in fact were not so expended by the said defendant on behalf of the said plaintiff but if so expended were expended on his own behalf, in the following sums:

1. Sums paid for rent, utilities, etc., at
1140 Mission Street, San Francisco,
California.\$1,125.58
2. Sums paid on account of merchandise
not received by Gayne Sales Co., Inc.,
but received by Maurice Trieber..... 541.49
3. Sums advanced to Maurice Trieber by
Gayne Sales Co., Inc..... 406.55
4. Sums drawn by Maurice Trieber
charged an expense, but not expended
on behalf of the corporation..... 1,673.05

which sums total \$3,746.67, all of which said sum is due, owing and unpaid.

III.

That plaintiff has demanded the payment of said sum of \$3,746.67, that nothing has been paid on account thereof, and the whole thereof is due, owing and payable.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. For compensatory damages in the sum of \$29,421.95 plus interest at the legal rate from April 30, 1951, on \$15,675.28, and legal interest on the balance from the date of the respective advances making up said balance;

2. For exemplary damages in the sum of \$15,000.00; and

3. For such other and further relief as the Court may deem meet and proper in the premises and for costs of suit incurred herein.

/s/ MORRIS M. GRUPP,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

Samuel Gayne being first duly sworn deposes and says:

That he is the President of the plaintiff corporation in the above-entitled action; that he has read the foregoing Second Amended Complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters

therein stated on information and belief and as to those matters he believes it to be true.

/s/ SAMUEL GAYNE.

Subscribed and sworn to before me this 3 day of June, 1954.

[Seal] /s/ ANNA M. GRUPP,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission Expires April 3, 1955.

[Endorsed]: Filed June 4, 1954; Superior Court.

EXHIBIT "B"

MINUTE ORDER

Book 571; Page 472; Tuesday, August 3, 1954

[Title of Court and Cause.]

Heretofore submitted, ordered demurrer to second (2) amended complaint sustained as to first cause of action without leave to amend.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 20, 1955, U.S.D.C.

[Title of District Court and Cause.]

ORDER, JUDGMENT AND DECREE OVER-
RULING OBJECTION OF MORRIS TRIE-
BER TO BANKRUPTCY COURT'S JURIS-
DICTION TO HEAR TRUSTEE'S OBJEC-
TIONS TO CLAIM AND/OR PETITION
FOR TURN-OVER ORDER ON THE
MERITS

Whereas, it appears from the record herein and the court so finds, that at the time John O. England, as trustee of the estate of the above-named bankrupt, filed "Trustee's Objections to the Allowance of the Claim of Morris Trieber and Petition for Turn-Over Order," i.e., on June 20, 1955, said Morris Trieber voluntarily was before this bankruptcy court, seeking through a certain verified "Proof of Claim and Letter of Attorney" to have a claim in the sum of \$3162.24, allowed against the estate of the above-named bankrupt, said claim having been filed in the above-entitled bankruptcy proceeding on October 18, 1954, this bankruptcy court concludes, as a matter of law, that this bankruptcy court, since the filing of the trustees said objection and petition for turn-over order, on June 20, 1955, as aforesaid, has had, and now has, jurisdiction over said Morris Trieber and the subject matter referred to in the trustee's said objection and/or the trustee's said petition for turn-over order.

It hereby is ordered, adjudged and decreed:

1. That this bankruptcy court has jurisdiction over said Morris Trieber and said subject matter;

2. That the objection to jurisdiction of said Morris Trieber be, and said objection is, overruled;

3. That January 30, 1956, be, and said last mentioned date is, hereby fixed for the hearing on the merits of the trustee's said objection and/or the trustee's said petition for turn-over order, and that said hearing, on the merits, be held on said last mentioned date, commencing at the hour of 10:00 o'clock a.m., of said last mentioned day, at Room 609 Grant Building, 1095 Market Street, San Francisco, California, to be postponed and/or continued from time to time thereafter as the circumstances shall warrant.

Dated: January 10th, 1956.

/s/ BURTON J. WYMAN,
Referee in Bankruptcy.

[Endorsed]: Filed January 10, 1956.

[Title of District Court and Cause.]

PETITION OF MORRIS TRIEBER FOR RE-
VIEW OF ORDER OF REFEREE BY A
JUDGE

To the Honorable Judges of the United States District Court for the Northern District of California:

Now comes Morris Trieber, a person aggrieved by an order of Honorable Burton J. Wyman, Referee in Bankruptcy, of this Honorable Court, and

within ten days after the entry of said order, files with the said Referee, this, his petition for review by a Judge of this Honorable Court of that certain order filed and entered the 10th day of January, 1956, by the said Referee and entitled "Order, Judgment and Decree Overruling Objection of Morris Trieber to Bankruptcy Court's Jurisdiction to Hear Trustee's Objections to Claim and/or Petition for Turn-Over Order of the Merits, which said order, omitting the caption and the title thereof, was and is in the words and figures following, to wit:

"Whereas, it appears from the record herein and the court so finds, that at the time John O. England, as trustee of the estate of the above-named bankrupt, filed 'Trustee's Objections to the Allowance of the Claim of Morris Trieber and Petition for Turn-Over Order,' i.e., on June 20, 1955, said Morris Trieber voluntarily was before this bankruptcy court, seeking through a certain verified 'Proof of Claim and Letter of Attorney' to have a claim in the sum of \$3,162.24, allowed **against the** estate of the above-named bankrupt, said claim having been filed in the above-entitled bankruptcy proceeding on October 18, 1954, this bankruptcy court concludes, as a matter of law, that this bankruptcy court, since the filing of the trustees said objection and petition for turn-over order, on June 20, 1955, as aforesaid, has had, and now has, jurisdiction over said Morris Trieber and the subject matter referred to in the trustee's said objection and/or the trustee's said petition for turn-over order,

“It hereby is ordered, adjudged and decreed:

“1. That this bankruptcy court has jurisdiction over said Morris Trieber and said subject matter;

“2. That the objection to jurisdiction of said Morris Trieber be, and said objection is, overruled;

“3. That January 30, 1956, be, and said last mentioned date is, hereby fixed for the hearing on the merits of the trustee's said objection and/or the trustee's said petition for turn-over order, and that said hearing, on the merits, be held on said last mentioned date, commencing at the hour of 10:00 o'clock a.m., of said last mentioned day, at Room 609 Grant Building, 1095 Market Street, San Francisco, California, to be postponed and/or continued from time to time thereafter as the circumstances shall warrant.

“Dated: January 10th, 1956.

“BURTON J. WYMAN,

“Referee in Bankruptcy.”

That the alleged errors in respect to the said order are as follows, to wit:

I.

That this Honorable Court has not, nor has the said Referee in Bankruptcy, any jurisdiction to hear or determine the petition of the Trustee in Bankruptcy or to hear or determine the order to show cause issued by the said Referee on or about the 20th day of June, 1955, for the reason that the

said proceeding before the said Referee in which the order sought to be removed was made presented a case of a contest between the Trustee in Bankruptcy and the said Morris Trieber, who was not a party to the said bankruptcy proceedings, and whose rights, claims and defense could not and cannot be summarily adjudicated by the said Referee or by this Honorable Court in such proceeding;

II.

That the petition of said Referee in Bankruptcy, to which the said Referee has overruled the objections of the said Morris Trieber in the order hereinabove set forth, sets forth a purported claim against the said Morris Trieber for damages alleged to have been suffered by the said bankrupt by reason of alleged fraudulent and wilful misrepresentations alleged to have been made by said Morris Trieber and that it is further alleged in the said petition of the said Trustee that the said bankrupt corporation suffered additional damages in the sum of \$10,000.00; and it is further alleged that the said corporation demands exemplary and punitive damages against the said Morris Trieber in the sum of \$15,000.00; and the said Trustee in the prayer of said petition prayed for an order that the said Morris Trieber pay and turn over to said Trustee the sum of \$40,675.28 together with interest at legal rate in the sum of \$15,675.28 from April 30, 1951, forward;

III.

And your petitioner further shows to Your Honors that neither this Honorable Court nor the

said Referee has or had any jurisdiction to make any such order; that such an order or judgment could be made only upon a trial before a court of competent jurisdiction, and after verdict of a jury duly impaneled and sworn to try the cause, or upon findings made by the court in such cause, if trial by jury were waived;

IV.

And in this behalf the said Morris Trieber further represents and shows to Your Honors that neither the said Referee in Bankruptcy nor any judge of this Honorable Court had or has or would in any event have any jurisdiction of any action brought by the said Trustee in Bankruptcy to recover said sum or any other sum of money claimed to be due from said Morris Trieber to said bankrupt, or to the trustee of said bankrupt by reason of any alleged fraud or by reason of any other matters or things whatsoever, for the reason that there is no diversity of citizenship between the parties, and the jurisdiction of any such action is in the jurisdiction of the courts of the State of California, whose jurisdiction cannot be ousted by any order that might be made by the said Referee or by this Honorable Court itself;

V.

And as further ground for review of the said order of the said Referee, your petitioner, said Morris Trieber, respectfully shows and represents to Your Honors that, all and singular, the matters and things set forth by the said Trustee in Bank-

ruptcy as grounds for the order and relief sought herein by the said Trustee, and, all and singular, the claims of the said Trustee therein set forth cannot be maintained by said Trustee in this proceeding for the reason that the said Trustee is barred and precluded from maintaining the same by virtue of a said judgment and order heretofore, to wit, on the 3rd day of August, 1954, duly given, made and entered in and by the Superior Court of the State of California in and for the City and County of San Francisco, and numbered therein 431,888, in which Gaynes Sales Co., Inc., a corporation, the bankrupt in this proceeding, was plaintiff, and the said Morris Trieber was defendant, in which a certain second amended complaint for damages for fraud, breach of contract and money had and received was sustained by said Superior Court without leave to amend; that the said second amended complaint was based upon the same purported cause of action and involved in all respects the said matters and things and all and singular the same claims as are set forth in the present proceeding before the said Referee in Bankruptcy, all of which, from the said second amended complaint in the action last aforesaid and from the minute order of said Superior Court sustaining the demurrer of the said Morris Trieber to the said complaint of said Gayne Sales Co., Inc., a corporation, without leave to amend, and which are set forth in the answer and return of Morris Trieber to the order to show cause issued by the said Referee in Bankruptcy, fully and at large appears;

VI.

And in this behalf, the said Morris Trieber further shows, as an error in respect to the said order of said Referee sought to be reviewed, that thereafter and on the 11th day of August, 1954, the said Gayne Sales Co., Inc., appealed from the order of said Superior Court to the Supreme Court of the State of California from the order of the said Superior Court sustaining the demurrer of the said Morris Trieber to the second amended complaint of Gayne Sales Co., a corporation. the bankrupt herein, without leave to amend; and the said Morris Trieber further shows that thereafter, and prior to the first day of December, 1954, the said Supreme Court of the State of California, in the exercise of the jurisdiction conferred upon it by the Constitution of the State of California, duly transferred the said appeal to the District Court of Appeals of the State of California in and for the First Appellate District, Division Two, and that on the first day of December, 1954, the said Gayne Sales Co., Inc., a corporation, filed in said District Court of Appeals a certain brief, in which the said corporation sets forth in substance and effect all of the matters and things now set forth in the present proceeding before the said Referee in Bankruptcy: that thereafter and on the 20th day of December, 1954, the said Morris Trieber filed in the said District Court of Appeals a notice of motion to dismiss the said appeal of the said Gayne Sales Co., Inc., from the said order sustaining the said demurrer to the second amended complaint without

leave to amend, and filed therewith a Memorandum of Points and Authorities in support of the said motion;

That thereafter and on the 10th day of January, 1955, the said motion to dismiss the said appeal from the said order of said Superior Court, came on regularly to be heard before the said District Court of Appeals and was argued by counsel; in consideration whereof it was by the said District Court of Appeals, ordered, adjudged and decreed that the said motion be granted and that said appeal of the said Gayne Sales Co., Inc., be dismissed; and that by reason of all and singular the premises, the said judgment in the aforesaid action of Gayne Sales Co., Inc., v. Morris Trieber, is *res judicata* as to all and singular the matters before said Referee and before this Honorable Court in the instant cause, and the said Gayne Sales Co., Inc., and its said Trustee in Bankruptcy are, and each of them is, estopped and concluded from seeking the order prayed for herein and from obtaining any of the relief sought by them, or by either of them; and said Referee and this Honorable Court are likewise estopped and precluded from granting any relief in the premises to the said bankrupt or to the said Trustee in Bankruptcy;

VII.

That the purported cause of action set forth in the petition of the said Trustee in Bankruptcy against the said Morris Trieber is barred by the

statute of limitations of the State of California, as set forth in subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California, by reason whereof the said Referee has no jurisdiction to hear or determine the petition of the said Trustee for a turn-over order on the merits or otherwise.

Wherefore, your petitioner, the said Morris Trieber, respectfully prays that the aforesaid order of said Referee in Bankruptcy may be reviewed by one of Your Honors and that upon said review it be ordered, adjudged and decreed that the aforesaid petition of said Trustee in Bankruptcy be dismissed and the order to show cause discharged, and for such other and further relief as to Your Honors shall seem meet, just and proper in the premises.

Dated: January 12, 1956.

/s/ JOSEPH A. BROWN,
Attorney for Petitioner.

[Endorsed]: Filed January 13, 1956.

[Title of District Court and Cause.]

ORDER

After the Gayne Sales Company had been adjudged a bankrupt, one Morris Trieber filed his proof of claim for a debt assertedly due him from the bankrupt. The Trustee of the bankrupt filed his written objections to the allowance of this claim and at the same time filed a petition for a turn-over

order. The Referee issued an order to show cause which was served upon Trieber. Thereafter, Trieber filed a written withdrawal of his claim, and then filed an answer and return to the show cause order and moved to dismiss the petition of the Trustee on the grounds that the Referee had no jurisdiction to hear any of the matters set forth in that petition. The matter of Trieber's objection to the Referee's jurisdiction was briefed, and on January 10, 1956, the Referee issued an order overruling Trieber's objections to his jurisdiction and setting a time for a hearing on the merits of the Trustee's petition. Trieber filed a petition for review of this order by a judge of this Court, and the Trustee moved to dismiss the petition for review and to remand the cause to the Referee for a hearing on the merits.

It appears that the order of the Referee involved here was interlocutory and not final, and that therefore this Court should not review the order. See *Collier on Bankruptcy* §39.21. Accordingly, the petition for review is hereby dismissed and the cause is remanded to the Referee for a hearing on the merits, reserving to the petitioner all his objections to the jurisdiction of the Referee.

Dated: April 11, 1956.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed April 12, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Morris Trieber hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment, order or decree heretofore, to wit, on the 12th day of April, 1956, given, made and entered in and by the United States District Court for the Northern District of California, Southern Division, which, omitting the caption thereof, was and is in the words and figures following, to wit:

“After the Gayne Sales Company had been adjudged a bankrupt, one Morris Trieber filed his proof of claim for a debt assertedly due him from the bankrupt. The Trustee of the bankrupt filed his written objections to the allowance of this claim and at the same time filed a petition for a turnover order. The Referee issued an order to show cause which was served upon Trieber. Thereafter, Trieber filed a written withdrawal of his claim, and then filed an answer and return to the show cause order and moved to dismiss the petition of the Trustee on the grounds that the Referee had no jurisdiction to hear any of the matters set forth in that petition. The matter of Trieber’s objection to the Referee’s jurisdiction was briefed, and on January 10, 1956, the Referee issued an order overruling Trieber’s objections to his jurisdiction and setting a time for a hearing on the merits of the Trustee’s petition. Trieber filed a petition for re-

view of this order by a judge of this Court, and the Trustee moved to dismiss the petition for review and to remand the cause to the Referee for a hearing on the merits.

“It appears that the order of the Referee involved here was interlocutory and not final, and that therefore this Court should not review the order. See Collier on Bankruptcy §39.21. Accordingly, the petition for review is hereby dismissed and the cause is remanded to the Referee for a hearing on the merits, reserving to the petitioner all his objections to the jurisdiction of the Referee.

“Dated: April, 1956.

“/s/ O. D. HAMLIN,
“United States District
Judge.”

Dated: April 16, 1956.

/s/ JOSEPH A. BROWN,
Attorney for Appellant
Morris Trieber.

Receipt of copy acknowledged.

[Endorsed]: Filed April 17, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON
APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

fornia, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the Appellant:

Order of Adjudication and Reference.

Proof of Claim, Morris Trieber.

Trustee's Objections to the Allowance of the Claim of Morris Trieber and Petition.

Order to Show Cause.

Answer and Return of Morris Trieber for Want of Jurisdiction.

Order of Referee filed January 10, 1956.

Petition of Morris Trieber for Review of Order of Referee.

Order.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Contents.

In witness whereof, I have hereunto set my hand and affixed seal of said District Court, this 17th day of May, 1956.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15134. United States Court of Appeals for the Ninth Circuit. Morris Trieber, Appellant, vs. John O. England, Trustee in Bankruptcy of the Estate of Gayne Sales Co., Inc., a Corporation, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: May 17, 1956.

Docketed: May 22, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15134

In the Matter of:

GAYNE SALES CO., INC.,
a California Corporation,

Bankrupt.

STATEMENT OF POINTS

Now comes Morris Trieber, who has on April 17, 1956, appealed to the United States Court of Appeals for the Ninth Circuit from the order of the said District Court given and made the 12th day of April, 1956, dismissing the petition of said Morris Trieber for a review by the said District Court of an order of the Referee in Bankruptcy, as from the notice of appeal to the said United States Court of Appeals for the Ninth Circuit fully and at large appears; and, pursuant to the provisions of Subdivision d of Rule 75 of the Federal Rules of Civil Procedure, designates the points on which said Morris Trieber intends to rely on said appeal:

1. Purported claim for affirmative relief by the trustee is barred by the Statute of Limitations;

2. The proceedings by the Trustee are barred by the final judgment of the State Court in an action between the bankrupt and Trieber, which was an action between the same parties for the same cause.

3. The principle of *res judicata* applies to a judgment based upon the sustaining of a demurrer.

4. Neither the Referee in Bankruptcy nor the District Court had any jurisdiction to make the order sought by the Trustee or to hear or determine the Trustee's claim for damages or to make the "turnover" order prayed for by the Trustee.

5. The District Court erred in holding that the order of the Referee was interlocutory and could not be reviewed.

6. The District Court erred in dismissing the petition of Morris Trieber for review and in remanding the cause to the Referee for a hearing on the merits.

Dated: June 4th, 1956.

/s/ JOSEPH A. BROWN,
Attorney for Appellant
Morris Trieber.

[Endorsed]: Filed June 5, 1956.

